SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 431

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

JACOB JOHN PFEIFER,
Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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I. The Supreme Court has no jurisdiction to grant a petition for writ of certiorari,

(1) where no federal question was presented or passed on below until the motion for re-argument (a) was filed after decision of the appeal to the highest Maryland court, (b) and was denied without opinion or further hearing;

(2) where resolution of the federal question then set forth was entirely unnecessary to the Maryland decision and was never passed on;

(3) and where the presentation of the same question, whatever its legal or factual basis, could have been made at the jury trial, at a motion for new trial or motion for judgment *non obstante verdicto*, or even on appeal prior to decision by the highest Maryland court 5

II. Assuming *arguendo* that the Supreme Court has jurisdiction to grant certiorari, certiorari should be denied where the judgment of the trial court was completely supported by the record in accordance with the established Maryland common law and statutory law, none of which is here attacked, constitutionally or otherwise 9

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OFFICIAL AND UNOFFICIAL REPORTS

The Order to Enter Judgment in the Circuit Court for Prince George's County, Maryland, is unreported and is not an opinion, but merely an order to the Clerk to enter judgment. The Opinion of the Court of Appeals of Maryland is reported at 246 Maryland 628, 229 A.2d 422 (May 11, 1967).

GROUNDS ON WHICH JURISDICTION IS INVOKED

Respondent presents to this Court that there is no jurisdiction for granting a petition for writ of certiorari in this case, as all of the questions presented by petition in its petition are questions presented here for the first time or in support of petitioner's Motion for Re-Hearing after decision by the highest Maryland State Court. Respondent's position is presented in the Argument following.

CONSTITUTIONAL PROVISIONS INVOLVED

It is evidenced from the petition that petitioner places varying degrees of reliance on the due process clause, the judicial impairment of contract clause, and the equal protection clause. It is respondent's position, however, that no constitutional provision is properly before this Court.

QUESTIONS PRESENTED

I – Does the Supreme Court of the United States have jurisdiction to grant a petition for writ of certiorari,

(1) where no Federal question was presented or passed on below until the Motion for Re-Argument

(a) was filed after decision of the appeal to the highest Maryland court, and

(b) was denied without opinion or further hearing.

(2) Where resolution of the Federal question then set forth was entirely unnecessary to the Maryland decision and was never passed on;

(3) and where the presentation of the same question, whatever its legal or factual basis, could have been made at the jury trial, at a motion for new trial, at a motion for judgment *non obstante verdicto*, or even on appeal prior to decision by the highest Maryland court.

II – Assuming *arguendo* that the Supreme Court has jurisdiction to grant certiorari, should certiorari be granted where

the judgment of the trial court was completely supported by the record in accordance with established Maryland common law and statutory law, none of which is here attacked, constitutionally or otherwise.

STATEMENT OF THE CASE

Dr. Jacob John Pfeifer, respondent, filed a declaration on October 18, 1965 in the Circuit Court for Prince George's County, Maryland, seeking a declaratory judgment (E. 5).[1]

On November 30, 1965, petitioner filed a responsive pleading placing the case at issue (E. 1).

The case came on for trial before a jury on May 10, 1966 (E. 3).

At the close of respondent's case (plaintiff below), petitioner moved for a directed verdict (E. 3, 9-15, 78). The motion was denied by the trial court.

At the close of all of the evidence, the petitioner renewed its motion for directed verdict (E. 3, 79), which was denied (E. 79). The trial court presented special issues to the jury (E. 80-84) to which petitioner did not except (E. 85-86).

The jury answered the special issues favorably to the respondent (E. 86-87), after which the trial court passed an order for entry of judgment in favor of the respondent. (Petition, appendix B)

After judgment nisi was entered on May 10, 1966, judgment absolute was entered on May 16, 1966. Petitioner filed no motion for new trial nor for judgment *non obstante verdicto.*

After judgment absolute was entered, petitioner appealed to the Court of Appeals of Maryland on May 16, 1966. The appeal came on for argument on April 13, 1967. On May 11, 1967, the Court of Appeals of Maryland affirmed the

[1] Designation "E" refers to pages of Joint Record Extract in the Court of Appeals of Maryland which, pursuant to Supreme Court Rule 21(4), have been filed by petitioner with the Supreme Court Clerk's office.

judgment and order of the circuit court (Appendix A, pages 19-28, *infra*).

Petitioner's subsequent motion for re-argument was denied on June 13, 1967 without hearing and without opinion.

Petitioner's petition follows from the decision of the Maryland Court of Appeals.

The factual record developed at the trial below is fairly complex, and is well summarized in the opinion of the Maryland Court of Appeals (Petition, Appendix A), with one addition. There was no communication between the medical doctor of the American Export Isbrandtsen Lines and Dr. Pfeifer about his injury to his left wrist or anything else, between his next-to-last trip which ended prior to the injury to his left wrist, and his last trip, on which he sustained his permanent disability, except for the notification by the steamship line to report for the April 22, 1963 trip (E. 77).

ARGUMENT

The Supreme Court Has No Jurisdiction To Grant a Petition for Writ of Certiorari,

(1) Where No Federal Question Was Presented or Passed on Below Until the Motion for Reargument

(a) Was Filed After Decision of the Appeal to the Highest Maryland Court,

(b) And Was Denied Without Opinion or Further Hearing;

(2) Where Resolution of the Federal Question Then Set Forth Was Entirely Unnecessary to the Maryland Decision and Was Never Passed on;

(3) And Where the Presentation of the Same Question, Whatever Its Legal or Factual Basis, Could Have Been Made at the Jury Trial, at a Motion for New Trial or Motion for Judgment Non Obstante Verdicto, or Even on Appeal Prior to Decision by the Highest Maryland Court.

Prior to the appearance in print of petitioner's petition here in this Court, the entire history of the record of this case, insofar as there is any mention by petitioner, respondent, the trial court or the highest court of Maryland, of any Federal question, is that contained at pages 15 and 16 of petitioner's Motion for Re-Argument before the Court of Appeals of Maryland and it is set forth in its entirety here:

> "K. The Court erred in that, in effect, its opinion, considered the contract that might have been made between the appellant and appellee rather than the contract that was actually entered into between the parties, and thus impaired the obligation of contract in violation of due process.
>
> It is submitted that it is fundamental that the Court may not consider any contract other than the one before it. While recognizing that any ambiguity in an insurance contract will be resolved against the insurer and in favor of the insured, in the instant case, it is undisputed that the appellee applied for Plan B coverage in his application and his then freedom from physical impairment and disease was necessary in order for him to be eligible

> for the coverage requested. Applicant was, at the time and for some two months after, carried in a not fit for duty status. Additionally, he was drawing disability compensation and had been doing so for almost twenty years. For the Court to consider a contract that might have been entered into between the parties, but was not, would amount, it is submitted, to judicial impairment of the contract that was under consideration and is in violation of the due process clause of the Constitution of the United States."

Three comments are in order concerning this passage in the motion:

1. Respondent is unaware of what contract other than the one at issue was considered by the Maryland Court of Appeals.

2. The Maryland Court of Appeals reference to directing a verdict in favor of the insured (respondent) under Plan C was clearly dicta, and may be found to be so by a simple reading of the paragraph in which that comment is contained (petition, Appendix A, pages 27-28).

3. The sole reference to a constitutional question in the courts below came in a Motion for Re-Argument which was denied without opinion or hearing.

It is well established law in the Supreme Court of the United States that a petition for a writ of certiorari to review a judgment of a State Court will be denied where the Federal claim was first raised by a petition for re-hearing of a decision on appeal to the highest court of the state, except where the opportunity to make the Federal claim did not exist prior to the decision of such court, or where the Federal question was actually decided on re-hearing. Absent the two exceptions, the Supreme Court is without jurisdiction to grant a petition for writ of certiorari. *American Surety Company v. Baldwin*, 287 U.S. 156, 77 L. ed. 231, 53 S.Ct. 98 (1932); *Great Northern Railway Company v. Sunburst Oil & Refining Company*, 287 U.S. 358, 77 L.

ed. 360, 53 S.Ct. 145 (1932); *Herndon v. Gee,* 295 U.S. 441, 79 L.ed. 1530, 55 S.Ct. 794 (1935); *Radio Station WOW v. Johnson,* 326 U.S. 120, 89 L.ed. 2092, 65 S.Ct. 1475 (1945).

There is absolutely nothing in the Maryland Court of Appeals opinion which reconstrued Maryland's law or any other law giving a new light to that law which would give rise to a Federal question which was not presented before. Petitioner's allegation, in his petition topic entitled "How Federal Questions are Presented", that the decision of the highest state court affirming a lower court was completely unexpected and unanticipated, is not supported by the record. As a matter of fact, affirmance of a lower court judgment based on a jury verdict would seem to be the expected result. Furthermore, the decision which followed petitioner's insertion of a Federal question allegation was the decision to deny the motion for re-argument after the highest state court had decided the appeal. Certainly the denial of that motion could not be thought to be "completely unexpected and unanticipated".

From an examination of the motion for re-argument and the questions presented and argument in support of those questions presented in petitioner's petition, it is evident that only Question No. 5 presented in support of the petition deals with matter in any way related to that allegation in the motion for re-argument. As already contended, respondent contends that petitioner was too late in raising that question.

As to Questions Presented numbered 1, 2, and 3, it is perfectly obvious that there is nothing in any of the courts below raising those questions, and each of them is presented for the first time in this court.

It is essential to the jurisdiction of the Supreme Court on certiorari to a State Court that it appear affirmatively from the record not only that a Federal question was presented for decision in that court, but also that its decision of the Fed-

eral question was necessary to the determination of the cause, and that the question was actually decided or that the judgment as rendered could not have been rendered without deciding it. *McGoldrick v. Gulf Oil Corporation*, 309 U.S. 2, 84 L. ed. 536, 60 S. Ct. 375, vacated on re-hearing in 309 U.S. 692, 84 L. ed. 1034, 60 S. Ct. 512; *Black v. Cutter Labs*, 351 U.S. 292, 100 L. ed. 1188, 76 S. Ct. 825; *Durley v. Mayo*, 351 U.S. 277, 100 L. ed. 1178, 76 S. Ct. 806; *Lynch v. New York*, 293 U.S. 52, 79 L. ed. 191, 55 S. Ct. 16.

Jurisdiction of the Supreme Court on certiorari cannot be founded on surmise as to what, if any, Federal question the state court rested its opinion and decision upon, nor can a claim of jurisdiction be sustained by reference to briefs or statements which are not part of the record. *Lynch v. New York, supra.*

Finally, Question Presented No. 4 asks the Supreme Court to pass on an interpretation of the Maryland State Constitution which does not fall within the jurisdiction invoked under 28 U.S.C. Section 1257 (3), and therefore falls outside the jurisdiction invoked by the petitioner.

And so the closest that the petitioner has come to raising a Federal question below was in a motion for re-argument before the highest state court. All of the other questions are either outside the jurisdiction petitioner himself invokes, or are raised here for the first time. This Court's precedent makes it entirely clear, therefore, that questions raised here for the first time are outside the jurisdiction of the Supreme Court. Coupling that together with one question raised here which is outside of the jurisdiction which even the petitioner invokes, and finally putting that together with a question raised for the first time on motion for re-argument which could have been raised earlier, and which was never passed on anyway in the lower court, this appears to be a petition for a writ of certiorari, jurisdiction for which the Supreme Court of the United States does not have.

II

Assuming Arguendo That the Supreme Court Has Jurisdiction To Grant Certiorari, Certiorari Should Be Denied Where the Judgment of the Trial Court Was Completely Supported by the Record in Accordance With the Established Maryland Common Law and Statutory Law, None of Which Is Here Attacked, Constitutionally or Otherwise

A simple reading of the facts of this case, as summarized in the Maryland Court of Appeals Opinion, with the addition added in respondent's statement of the case, respondent contends, makes it entirely clear that the decision of the jury, the order entered thereon, and the decision of the Maryland Court of Appeals was completely supported by the record in accordance with established Maryland common law and statutory law. Petitioner does not attack the Maryland statutory law, nor does he attack any of the cases decided as part of the body of common law in Maryland. Instead, he makes repeated reference to the facts of the case and asserts that no factual issues are presented, time and again ignoring portions of the testimony which are damaging to his side of the case, and which the Court of Appeals very aptly summarized in its Opinion.

CONCLUSION

Wherefore, respondent respectfully submits that the petition for a writ of certiorari to the Court of Appeals of Maryland be denied.

Respectfully submitted,

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APPENDIX I

ADDENDA TO JOINT RECORD EXTRACT

At page E. 32, after line 3 and before the three stars, the following should be included:

"Question: They did not give you a specific time to return for further treatment at that time?

Answer: Not that I remember, no."

At page E. 34, after the three stars and before the words "Mr. Freeman", six lines from the bottom of the page, the following should be inserted:

"MR. MANN: I will stipulate.

THE COURT: 365 days.

MR. MANN: Yes sir, 365 days from the date he is totally disabled, as defined in the policy."

At page E. 42, the last six lines beginning with "MR. MANN" should be omitted and replaced with three stars.

At page E. 64, at the bottom of the page immediately preceding the three stars, the following should be inserted:

"Answer: A few days later. I don't know the exact date."